# Revised Ozone & Particulate Matter NAAQS -- Impact of American Trucking Decision

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**Environmental Update Course**
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# *Web Sites for Clean Air Act*

- DENIX (Defense Environmental Network and Information Exchange)--Clean Air Act Services Steering Committee: http://www/denix.osd.mil/denix/CAASSC/caassc.html
- EPA, Office of Air and Radiation: http://www.epa.gov/oar
- U.S. Distr. Ct. (D.C. Cir.): http://www/cadc.uscourts.gov/common/opinions

# *Litigation Upsets Air Program*

- Major Decisions Overturn EPA's Clean Air Act Authority
- American Trucking (May 14, 1999)
  - Declared Ozone Standard Unenforceable
  - Remanded Particulate Matter Standard
- Same Court (May 24, 1999)
  - Stayed EPA Rule to Regulate NOx Emissions in 21 states--NOx SIP Call

# American Trucking v. EPA

- U. S. Court of Appeals, D.C. Circuit, Struck Down Revised Ozone and PM Standards
- Method of Setting Standards Was Unreasonable - - Everyone Knows More Pollution Causes More Harm!!!
- EPA's Interpretation of Clean Air Act Section on Promulgation of NAAQS is Unconstitutional

# American Trucking v. EPA

- Far Reaching Impacts for ALL EPA Rules
- New Ozone Standard not Vacated, but Cannot be Enforced
- Coarse Particle Standard Vacated as "Arbitrary & Capricious"
- EPA Appeals Ruling
  - **Petition for Rehearing (Original Three Judges)**
  - **Petition for Hearing En Banc - Eleven Judge Panel**
  - **U.S. Supreme Court**

# *Background*

- CAA Section 109 Requires Periodic Review and Possible Revision of NAAQS
- Clean Air Scientific Advisory Committee (CASAC) Reviews EPA's Scientific Criteria for Revising Standards
- EPA Decision Following CASAC Review Resulted in Proposed Revised Ozone & Particulate Matter Standards
- Final Rules: Federal Register, Vol. 62, No. 139, July 18, 1997
  - Ozone, 38856-38896
  - Particulate Matter, 38652-38760

# *PRIMARY NAAQS*

- Standards Necessary to Protect Public Health (Judgment of EPA Administrator)
- Must Allow “Adequate Margin of Safety”
- Costs of Compliance Not to be Considered (Statute)

# *SECONDARY NAAQS*

- Standards Necessary to Protect Public Welfare
- Public Welfare= Harm to Environment, Plants, Animals, Streams, Rivers, Trees
- Secondary Standards Can be More Stringent than Primary
- More Sensitive Ecosystems

# *Controversy on Standards*

- Clinton Endorsed New NAAQS - - Set up Showdown with Congress
- Uncertainties in the Science
- Industry, Mayors, Small Businesses Vigorously Opposed Standards
- Called “Economic Amputation” that EPA Lacked Sound Science to Justify

# *Change in Ozone Standard*

- Primary
  - **Old = 0.12 ppm, 1-hr averaging, 1-expected exceedance**
  - **New = 0.08 ppm, 8-hr, 3-yr average**
  - "Concentration Based"-3-yr average of annual 4th-highest daily maximum 8-hr ozone concentrations
  - **New 8-hr Standard Protects Against Longer Exposure**
- Secondary
  - Same as Primary (EPA considered an ozone season alternative, but did not adopt)

# PM NAAQS

- Revised to Add
  - New Annual PM2.5 Standard= 15 micrograms per cubic meter (umg/m3)
  - New 24 Hour PM2.5 Standard = 65 umg/m3
- Retained and Modified
  - Current Annual PM10 = 50 umg/m3
  - New 24 Hour PM10 = 150 umg/m3
- Both PM2.5 and PM10 Standards Applicable

# *Secondary PM NAAQS*

- Same as Primary
- Linked to Regional Haze Rule- Protection of Visibility in National Parks and Wilderness Areas
- Addresses Visibility Impairment (Transport of Particulates) in Special Areas of Concern, the Class I Areas

# *White House Statement*

- Implementation of PM2.5 Standard
  - Five Years to Build Monitoring System
  - Another Scientific Review of Health Effects of Fine Particulates
  - Additional Time after Data Collection for SIP Calls & EPA Review of SIPS,
  - Actual Compliance Time (7-8 years More)

# Number of Military Installations Potentially Impacted

- **Number of Military Bases in Areas that may not Meet New NAAQS**
  - **Ozone: (Reliable)**
    - **Army = 63 (14 new)**
    - **Air Force = 68 (23 new)**
    - **Navy = 54 (5 new)**
    - **Marine Corps = 5 (none new)**
  - **Particulate Matter (PM 2.5): (Unreliable)**
    - **Army = 25 (20 new)**
    - **Air Force = 36 (24 new)**
    - **Navy = 23 (17 new)**
    - **Marine Corps = 4 (2 new)**
  - **Estimates Based on Limited Data**

# *Estimated DoD Costs*

- **Capital Costs** Per Impacted Installation
  - **$0.6M - $4.9M for Ozone**
  - **$0.5M - $5.2M for PM**
- Capital Cost Estimates --- Unreliable
- Annual (Recurring) Cost Estimates -- Not Available

# EPA LETTER TO DOD

- EPA Administrator Sent Letter to SECDEF on June 17, 1997, Agreed to Ease Impacts of New NAAQS on Military
- Services Steering Committee Drafted Letter
- EPA -- No Need for DoD Activities to be Target of State's Control Strategies to Achieve New Standards

# *EPA Letter*

- General Conformity
  - EPA Recognized Special Problem With Base Closure/Realignments
  - “Soft Language”-EPA Agreed to Work with DoD to Assure Conformity is Applied in
    - Cost Effective
    - Environmentally Friendly Manner

# *American Trucking*

- I Constitutional Argument- Nondelegation
- II General Claims of States- All Rejected
- III Ozone Standard
  - Unenforceable
  - Health Benefits Need to be Considered
- IV Coarse Particle Standard (PM10)

# *What Happens Next??? American Trucking, Section I*

- EPA Assumed Unconstitutional Authority by Not Establishing Principles for Issuing New Standards
- Decision on Nondelegation Doctrine Could Be Overturned
- Invoked by Only Two of Three Judges
- Even if Nondelegation Section is Overturned, EPA Still has Trouble

# *What Happens Next??? American Trucking- Section III*

- New 8-Hour Ozone Standard
  - **Unenforceable**
    - 1990 Clean Air Act Amendments
    - Congress's Plan for Reducing Ozone
    - Congress Set Up
    - Ozone Classifications and Attainment Dates
    - Stripped EPA of Its Discretion

# *American Trucking- Section III*

- 8-Hour Ozone Standard (cont.)
- EPA Ignored Possible Health Benefits of Tropospheric Ozone
  - Protects against UV Rays
  - Prevents Cataracts, skin cancers

# *American Trucking- Section IV*

- Coarse Particulate Matter Standard (PM10) Vacated as Arbitrary and Capricious
  - Coarse Particles come from crushing/grinding; Identified as Range=PM10-to PM2.5
  - Fine Particles are from Combustion=2.5 or less
  - Retention of PM10 Indicator, Simultaneously with New Fine Particle 2.5 Indicator--Arbitrary
  - Two Do Not Work Together--Double Regulation of 2.5 Component/Underregulation

# *What Happens Next??? American Trucking*

- EPA Filed Petition for Rehearing En Banc (June 28, 1999)
  - Asked Full Panel to Rehear the Case
  - Not Granted Automatically-Majority of Judges Must Vote for Rehearing
  - EPA Did Not Appeal PM Decision
- Petition Denied (Oct. 29, 1999)

# *What Happens Next??? American Trucking*

- EPA Petition for Rehearing by Panel
- Decision (Oct. 29, 1999)--Granted in Part
- “Clues” on to How to “Fix” the Constitutional Deficiency
- Opinion Modified in Part to Avoid Enforcement Problem
- EPA Still Must Consider Benefits of Ozone

# *What Happens Next??? American Trucking*

- EPA Argued CAA 109 Has Principles Limiting Agency's Discretion
- Sec. 109(b)(1) requires EPA to Promulgate NAAQS Based on Air Quality Criteria
  - Requisite to Protect Human Health
  - With an Adequate Margin of Safety
- EPA-This Guides Standard Setting

# *What Happens Next??? American Trucking*

- Court- “These Sentences Beg the Key Question About the Intelligible Principle--Namely-What is It?”
- When Statutory Language and Existing Agency Interpretation Involve an Unconstitutional Delegation of Power, But
- Interpretation Without Constitutional Weakness Available

# *What Happens Next??? American Trucking*

- Court Will Not Strike Down Statute, but Will Give Agency Opportunity to Extract a Determinate Standard
- EPA Argued It Now Extracted Standards
  - Ozone: EPA Inferred Existence of Health Effects Below 0.08 ppm., But Concluded they were Less Serious because they were Transitory and Reversible

# *What Happens Next??? American Trucking*

- Particulate Matter:  EPA's Decision Was Determined by the 95 Per Cent Confidence Level to Separate Results that could be due to Chance from Results Showing Causation

- Court--
  - No Opinion on Sufficiency of Principles
  - Only After EPA Has Applied them in Setting NAAQS, Can Court Evaluate re Nondelegation Doctrine

# *What Happens Next??? American Trucking*

- EPA Lacked Authority to Enforce Revised Ozone Standard Due to CAA, Subpart 2
- Court Slightly Modifies Language--EPA Can Enforce Revised Ozone NAAQS only in Conformity with Subpart 2 (See Concur/Dissent in Part)
  - Subpart 2 Addresses Continued Nonattainment of 1-hour Standard (Attainment Dates, etc.)
  - But Can Also Be Used for New 8-hr Ozone Standard in Areas that Have Attained 1-hr.

# *What Happens Next??? American Trucking*

- EPA Could Not Enforce Stricter Standard in Los Angeles Until 2012, but Could Enforce Earlier in Rest of Country
- Court has Reconciled and Softened Language
- Bottom Line: EPA Could Reissue Revised NAAQS and Correct Legal Problems Somewhat Easily, but No Certainty on Constitutional Issue

# *What Happens Next??? American Trucking*

- American Lung Association (Intervenor) Filed Petition for Certiorari with Supreme Court (Jan. 27, 2000)
- Two Grounds of Error Alleged:
  - Unconstitutional Delegation
  - Failure to Consider Health Benefit of Ozone
- Grant is Discretionary
- Supreme Court will rule in Spring (2000)

# *What Happens Next??? American Trucking*

- EPA Had Also Wanted to Appeal to Supreme Court
- Now More Likely EPA Will Join Appeal
- EPA Administrator Browner Wants to Argue Case Herself (She is a Lawyer)
- Unlikely, due to Timing, Unless Gore is Elected